IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. BENJAMIN PATRICK HOLDEN, Petitioner.	)	2 CA-CR 2007-0032-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022526

Honorable Leslie B. Miller, Judge

REVIEW GRANTED;
RELIEF GRANTED IN PART AND DENIED IN PART

Robert J. Hooker, Pima County Public Defender
By M. Edith Cunningham
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Benjamin Holden was convicted after a jury trial of first-degree murder for the shooting death of Danny T. We affirmed his convictions and sentences on appeal. *State v. Holden*, No. 2 CA-CR 2003-0304 (memorandum decision filed Aug. 20, 2004). Holden then sought post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., and the trial court denied relief. Most of the twelve issues he raises in his petition for review involve claims of ineffective assistance of both trial and appellate counsel. Because Holden has raised a colorable claim that his counsel deprived him of his right to testify at trial, we remand for an evidentiary hearing on that claim alone. We also modify his sentence to reflect 413 days of presentence incarceration credit, but we deny relief on Holden's remaining claims.

¶2 We have taken the following facts in part from our memorandum decision. We state all facts in the light most favorable to sustaining the conviction. *State v. DeSanti*, 8 Ariz. App. 77, 78-79, 443 P.2d 439, 440-41 (1968). In July 2002, Danny arrived uninvited at the home of Jim L., who was in bed with an injured leg. Danny was intoxicated and confrontational. He refused to leave notwithstanding requests by Jim and everyone else present that he do so. Jim eventually asked Holden to help get Danny to leave. Holden told Danny to leave several times while pointing a gun at Danny's head. One witness testified Danny had picked up a ceramic cow's head that Holden then broke by hitting it with his gun. Other witnesses, including Holden, stated Danny had picked up two conch shells but put them down while Holden had the gun pointed at him.

¶3 According to Holden, Danny then lunged at him and he fired the gun without realizing what was happening. Other witnesses testified Holden told Danny repeatedly that he was going to shoot him before the gun went off. Danny died of one gunshot wound to the center of his forehead. The medical examiner testified at trial that the fatal shot was fired at extremely close range—several inches at most but more likely within one inch of Danny's forehead. A jury found Holden guilty of premeditated murder.

¶4 In his Rule 32 petition, Holden raised numerous claims of ineffective assistance of counsel. The trial court dismissed the petition without an evidentiary hearing. Rule 32.6(c) provides "the court shall order the petition dismissed" if it determines that "no [non-precluded] claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings." We review for an abuse of discretion the trial court's determination whether a defendant has stated a colorable claim for relief, warranting an evidentiary hearing. *State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 601 (1995).

¶5 "A colorable claim is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). "To determine whether a conviction should be reversed due to ineffective assistance of counsel, we apply a two-pronged test: (1) whether counsel's performance was reasonable under all the circumstances; and (2) whether a reasonable probability exists that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *State v. Amaya-Ruiz*, 166 Ariz. 152, 180, 800 P.2d 1260, 1288 (1990); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984) (ineffective assistance of counsel as violation of Sixth Amendment requires showing counsel made errors so serious they deprived defendant of fair trial).

Expert Witnesses

¶6 Holden argues his trial counsel was ineffective for failing to consult with experts or present expert testimony to support his defense. As part of his post-conviction petition, Holden submitted affidavits containing the opinions of two experts: one to support his theory that the gun had discharged involuntarily and one to corroborate his theory of how the incident had happened through the analysis of bloodstain patterns.

¶7 Holden cites cases from Arizona as well as other jurisdictions in which courts have found counsel ineffective for failing to consult with an expert or secure scientific testimony in defending a case. *See, e.g., State v. Edwards*, 139 Ariz. 217, 221, 677 P.2d 1325, 1329 (App. 1983) (counsel ineffective in context of insanity defense when he failed to interview defendant's psychiatrist until day of trial); *see also Dugas v. Coplan*, 428 F.3d 317, 331-32 (1st Cir. 2005) (finding counsel ineffective because "hopelessly unprepared" to challenge state's "many expert witnesses" on arson); *Holsomback v. White*, 133 F.3d 1382, 1387-88 (11th Cir. 1998) (finding counsel ineffective for not calling or consulting expert witness in sexual abuse case with no medical evidence of abuse and only evidence of

guilt testimony of alleged victim); *Foster v. Lockhart*, 9 F.3d 722, 726-27 (8th Cir. 1993) (finding counsel ineffective for failing to investigate or present defense of impotency in rape case when "uncontradicted medical evidence" showed defendant was "physically incapable of committing the rape in the manner the victim and the State alleged at trial"); *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (trial counsel's failure to investigate role of quilt in shooting was ineffective when evidence would have "presented the defense with a theory of the case that squared fully with [defendant]'s version of events"). But our evaluation of ineffective assistance of counsel claims is case specific, and Holden is only entitled to relief on this basis if counsel's failure to secure scientific testimony constituted both deficient performance of counsel and could have affected the outcome of the case. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

¶8 Because Holden has not shown he was prejudiced as a result, we need not decide whether his counsel's performance was deficient. *See State v. Fulminante*, 161 Ariz. 237, 260, 778 P.2d 602, 625 (1988) (applying prejudice prong first to ineffective assistance of counsel claim); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure of one prong of the *Strickland* test results in failure of claim). Holden contends an expert was needed to refute Pima County Sheriff's Detective Marcus Amado's testimony about the location of Danny's body and the lack of blood in the area Holden claimed Danny

had lunged.[1] In support of this argument, he submitted the opinion of Tom Bevel, a forensic consultant.[2]

¶9 But Bevel's opinion does not substantially conflict with the state's theory, which Holden has inaccurately characterized. Specifically, Holden contends the state argued that Danny "was backed in the corner of the bed" when he was shot—a proposition Bevel would have contradicted. In fact, the state only claimed Danny's head was "backed in the corner of that bed" when he was found dead. In making this statement, the state relied on photographs that showed a large pool of blood where Danny's head had rested after he was shot. The state did not attempt to pinpoint exactly where Danny had been standing when he was shot but did argue Danny could not have fallen back by the corner of the bed if he had been standing in the doorway, as Holden claimed.

¶10 Holden also claims Bevel's expert bloodstain analysis supports his claim Danny "had moved to within an arm's length of Holden, who was standing near the doorway." But Bevel's opinion was that Danny had been "standing in the bedroom near the

---

[1]In the alternative, Holden contends "the evidence of the spatial relationships between Holden and [Danny] and the conditions at the time of the shooting" is newly discovered evidence entitling him to a new trial. *See* Ariz. R. Crim. P. 32.1(e). But although he concedes such evidence was known at the time of trial, he contends its significance was not discovered until the post-conviction investigation. This is not newly discovered evidence under Rule 32.1(e). *See State v. Dogan*, 150 Ariz. 595, 600, 724 P.2d 1264, 1269 (App. 1986) ("discovery" by different attorney of fact based on defendant's photograph in lineup that could have been argued at trial not newly discovered evidence as contemplated by the rule).

[2]We note Bevel based his opinion in part on evidence not introduced at trial.

foot of the bed at the time he was shot." This opinion does not conflict with the state's theory, and therefore, we fail to see how it would have changed the outcome of the case had Bevel's opinion been introduced at trial. *See Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69 (defendant only suffers prejudice from counsel's alleged errors if reasonable probability result of trial would have been different but for errors).

¶11 Holden also emphasizes that Bevel stated Danny could have remained upright for a few moments after he had been shot. He argues this evidence "supports the inference that [Danny] could have moved after being shot." But he does not specify how such an inference would have helped his defense when he was claiming Danny had moved toward him before he was shot. Similarly, Holden emphasizes that, in Bevel's opinion, Danny's arm probably was in a raised position when he had been shot. But Bevel never stated that such evidence supports Holden's contention that Danny had been reaching for the gun. Rather, Bevel opines that the bloodstains are consistent with Danny's hand having been up by his head or face, rather than Danny reaching out in front of him. Because Bevel's opinion would not have changed the result at trial, Holden has not established he suffered prejudice as a result of counsel's failure to present that testimony.

¶12 Holden also argues his trial counsel was ineffective for failing to use crime scene photographs to impeach Amado's testimony that no blood was found near the doorway where Holden said he was standing when he shot Danny. The photograph at issue, which was not admitted at trial, shows a tiny bloodstain on the ceiling. At trial, the

prosecutor asked Amado, "Did y[ou] find any bloodstains in the area described by Mr. Holden as the area where the incident occurred?" And the detective responded, "No, I did not."

¶13 Assuming for the sake of argument Amado's answer was erroneous because of the photograph in question, Holden has not demonstrated he suffered prejudice as a result. Holden's own expert, Bevel, concluded that the photograph "further substantiates that [Danny] was standing in the bedroom near the foot of the bed at the time he was shot, as his head would be near the ceiling and the backspatter would be capable of reaching this area of the ceiling." Thus, Holden's own proffered expert testimony does not support the inferences Holden would have us draw from the location of the ceiling bloodstain. Holden has not demonstrated that the admission of the photograph would have changed the outcome of the case.[3]

¶14 Holden also argues his counsel was ineffective for failing to consult with an expert, or present expert testimony, to support his defense that the gun involuntarily discharged. In support of this argument, Holden submitted the affidavit of Roger Enoka, a human movement consultant.[4] Enoka could not "state with certainty that the discharge was

---

[3]For the same reason, we reject Holden's claim that the state committed prosecutorial misconduct, prejudicial to him, when it elicited Amado's arguably incorrect testimony.

[4]Enoka based his opinion on a review of Holden's statement to police as well as the trial testimony of two of the state's four witnesses who were in the home at the time of the shooting.

unintentional," but stated there were circumstances surrounding the shooting "that could have produced an unintended discharge" of the gun, such as "the movement of [Danny] toward Mr. Holden" and "the backward step by Mr. Holden away from [Danny]."

¶15 Holden has not shown he suffered prejudice by counsel's failure to call a witness on the topic. Enoka would not conclude with certainty the evidence showed the discharge had been accidental but simply concluded the circumstances surrounding the shooting "could have caused Mr. Holden to hold the gun more firmly and thereby unintentionally pull[] the trigger." And many of the circumstances on which he based that conclusion were taken from Holden's version of events—a version that was discredited on many points by the testimony of other witnesses. In addition, had the jury believed Holden's version of the events, the jury could have drawn many of the same inferences as Enoka without the benefit of his expert testimony. *See Gorney v. Meaney*, 214 Ariz. 226, ¶ 15, 150 P.3d 799, 804 (App. 2007) (expert testimony inappropriate when jury can determine issue without it).

¶16 Thus, although Enoka's testimony would have provided a scientific explanation for Holden's theory that he had accidentally pulled the trigger, it would not have been enough to change the outcome of this case, given evidence that strongly contradicted Holden's assertion that the gun had discharged accidentally. Holden discharged the gun within three inches of Danny's head, he did so after repeatedly threatening to kill Danny, and none of the three eyewitnesses to the shooting corroborated

that Danny aggressively lunged at Holden. Therefore, although the testimony most likely would have been relevant and admissible, Holden did not suffer prejudice by its absence and the trial court did not err by dismissing the claim.

Crime Prevention Instruction

¶17 At trial, Holden requested the jury be instructed on the crime prevention justification set forth in A.R.S. § 13-411. The trial court refused the instruction. Holden now contends his appellate counsel was ineffective in failing to challenge that ruling on appeal.

¶18 Section 13-411(A) provides a defense to the use of physical force or deadly physical force against another person "if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of [one of the enumerated crimes]." The statute further provides there is no duty to retreat before using deadly or nondeadly physical force and that a person "is presumed to be acting reasonably" when acting pursuant to the statute. § 13-411(B), (C). Holden contends he was entitled to this instruction because, in attempting to remove Danny from the residence, he was preventing Danny from committing aggravated assault. *See* § 13-411(A) (aggravated assault committed under § 13-1204(A) (1) or (2) one of enumerated crimes under crime prevention statute). The trial court refused the requested instruction after the state argued that the defense was not supported by the evidence.

¶19 A defendant is entitled to any justification instruction "supported by 'the slightest evidence.'" *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997), *quoting State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989). Holden emphasizes the crime prevention defense is broader than the other justification defenses. Its only limitation upon the use of deadly force is "the reasonableness of the response," *State v. Korzep*, 165 Ariz. 490, 492, 799 P.2d 831, 833 (1990), while "the other justification defenses require an immediate threat to personal safety before deadly force may be used." *Id.* Therefore, the self-defense instruction was not necessarily adequate because a jury could find one without the other. *See id.* (emphasizing differences between § 13-411 and other justification defenses); *State v. Garfield*, 208 Ariz. 275, ¶ 15, 92 P.3d 905, 909 (App. 2004) (because crime prevention justification "presents a unique defense," not harmless error when jury merely instructed on self-defense); *Hussain*, 189 Ariz. at 339, 942 P.2d at 1171 (self-defense instruction did not adequately cover the requested instruction based on § 13-411); *see also State v. Taylor*, 169 Ariz. 121, 123, 817 P.2d 488, 490 (1991) (reversible error to fail to instruct jury when slightest evidence supported crime prevention justification).

¶20 Holden contends that, had appellate counsel raised the issue to this court, the outcome of his appeal might have been different.[5] *See Bennett*, 213 Ariz. 562, ¶ 25, 146

[5]In the alternative, Holden argues *Garfield* was a significant change in the law that invalidates his conviction pursuant to Rule 32.1(g), Ariz. R. Crim. P. But because we have determined there was insufficient evidence for Holden to have been entitled to the crime

P.3d at 69. He relies on *Garfield*, issued while his appeal was pending in this court, in which we reversed a conviction for the trial court's refusal to instruct the jury on the crime prevention defense. *See* 208 Ariz. 275, ¶ 15, 92 P.3d at 909. Holden complains that his counsel failed to seek leave to file a supplemental brief pursuant to *Garfield* and, in the alternative, that his appellate counsel could have made the same argument the defendant made in *Garfield* in his opening brief—that the crime prevention instruction applies to an invited guest—based on Arizona law at that time. *See Korzep*, 165 Ariz. at 493-94, 799 P.2d at 834-35 (holding crime prevention defense applicable to resident of house protecting against crime by another resident and suggesting defense applicable to even broader classes of persons).

¶21 In *Garfield*, the trial court had refused to provide an instruction on the crime prevention defense because the defendant was only a guest in the home he was arguably trying to protect. 208 Ariz. 275, ¶ 10, 92 P.3d at 908. Anchoring our analysis in the legislative intent behind the statute—protecting Arizona homes from crime—we rejected that distinction and found that such an instruction was reasonably supported by the evidence. *Id.* ¶¶ 14-15. We reversed the defendant's conviction, finding he had suffered prejudice, in part because the self-defense instruction had not been an adequate substitute. *Id.* ¶ 15.

---

prevention instruction, he is not entitled to relief on that ground. *See* Ariz. R. Crim. P. 32.1(g) (to be entitled to relief based on significant change in the law, petitioner must show it would apply to his case and would probably overturn his conviction).

¶22 We agree with Holden that *Garfield* might have changed the outcome of his case if the evidence supported such an instruction. But unlike in *Garfield*, where we held the defendant was entitled to the crime prevention instruction based on evidence the victim had drawn a gun before the defendant shot him, *id.* ¶ 12, there was no evidence Danny was threatening anyone with a deadly weapon or dangerous instrument at the time Holden entered the bedroom in an effort to make Danny leave. And even assuming the cow's head or conch shells could be considered dangerous instruments, the record is clear Holden continued to point the gun at Danny well after Danny had put any such items down.

¶23 Although Holden emphasizes the breadth of the crime prevention defense in comparison to self-defense, the former defense is not available to a defendant who uses greater force than necessary to prevent the crime. *See State v. Martinez*, 202 Ariz. 507, ¶ 12, 47 P.3d 1145, 1147-48 (App. 2002) (defendant must have reasonable belief that force need be used and amount of force is necessary to justify actions under crime prevention defense). Holden presented no evidence that, at the time he first threatened and then used deadly physical force against Danny, Holden could have "reasonably believe[d]" that such force was "immediately necessary" to prevent Danny from assaulting anyone with a deadly weapon or dangerous instrument. § 13-411(A). Therefore, Holden could not have suffered prejudice when the trial court refused the instruction and when appellate counsel failed to raise the issue on appeal. We find no abuse of discretion in the trial court's dismissal of this claim.

Self-Defense Instructions

¶24 Holden next argues his appellate counsel was ineffective for failing to challenge the trial court's denial of his request for jury instructions on "imperfect self-defense" and unintentional use of defensive force. The proposed instructions stated that the jury must find the defendant guilty of either manslaughter or negligent homicide—the lesser-included offenses of second-degree murder and manslaughter respectively—if it found he had "acted on the basis of an honest but recklessly [or negligently] formed belief that he needed to use the amount of force he employed for self-defense." But the instructions requested were based on Kentucky, not Arizona, law. To supplement his request, Holden offered the trial court an Arizona case in support of one of the instructions but the court found that case did not require the jury be instructed beyond the elements of manslaughter and negligent homicide. *See State v. Govan*, 154 Ariz. 611, 744 P.2d 712 (App. 1987).

¶25 We agree with the trial court that *Govan* does not require the jury be instructed on imperfect self-defense. There, the defendant objected to the trial court's grant of the state's request for a lesser-included instruction on manslaughter. *Id.* at 614, 744 P.2d at 715. The defendant argued that the instruction was inconsistent with his theory that he had committed an intentional act but in self-defense. Division One of this court found there was sufficient evidence for the jury to have determined his act of firing the gun without aiming at the victim during an argument between the two, combined with the fact that the victim had shot the defendant earlier in the day, was enough evidence his act had been "done

recklessly, i.e. without a reasonable belief that the victim was about to draw her weapon and fire at him again." *Id.* at 615, 744 P.2d at 716. Thus, we approved the conventional instruction for manslaughter in *Govan* with recourse to the evidence of the defendant's relevant states of mind, rather than on a theory of imperfect self-defense. *Id.*

¶26 The standard instructions for manslaughter and negligent homicide given here likewise anchored Holden's level of culpability in his state of mind.[6] In so doing, the instructions also entitled the jury to return a verdict in Holden's favor had it concluded that Holden had unintentionally used defensive force. Because those instructions adequately and correctly stated Arizona law, the court did not err in refusing Holden's requested instructions. For this reason, and because no Arizona law supports a defendant's

---

[6]The court instructed the jury:

> A person commits manslaughter by: Recklessly causing the death of another person, or intentionally committing second degree murder upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim . . . [and t]he crime of negligent homicide requires proof that the defendant caused the death of another person by criminally negligent conduct.

The court also instructed that each offense was a lesser-included of another and that the jurors were

> permitted to find the defendant guilty of the less serious offense if: The evidence [did] not show beyond a reasonable doubt that the defendant [wa]s guilty of the greater offense; or after reasonable efforts [they could] not agree whether or not the evidence [did] show beyond a reasonable doubt that the defendant [wa]s guilty of the greater offense.

entitlement to any proposed additional instruction, Holden's appellate counsel could not have been ineffective for failing to raise the issue on appeal. *See Noleen*, 142 Ariz. at 104, 688 P.2d at 996; *Pima County v. Gonzalez*, 193 Ariz. 18, ¶ 7, 969 P.2d 183, 185 (App. 1998) (court is required to refuse instructions that do not state correct law; not error for court to refuse instructions adequately covered by those given).

¶27 Holden contends his trial counsel was ineffective for requesting a confusing self-defense instruction.[7] The instruction requested by trial counsel, and adopted in pertinent part by the trial court, was taken from the Recommended Arizona Jury Instructions and states as follows:

> A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:
>
> 1. A reasonable person in the defendant's situation would have believed that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force; *and*
>
> 2. The defendant used or threatened to use no more physical force than would have appeared necessary to a reasonable person in the defendant's situation.
>
> However, a defendant may use deadly physical force in self-defense only to protect against [what a reasonable person

[7]We note Holden's claim is based on the instruction his counsel requested, not the instruction actually given to the jury. However, the two are substantially the same and the portion of the instruction Holden claims is confusing is identical.

> in his situation would believe is] another's use or threatened use of deadly physical force.
>
> Self[-]defense justifies the use or threat of physical force only while the apparent danger continues. The right to use physical force in self-defense ends when the apparent danger ends.

(Alteration in original.) Holden compares this instruction to the one our supreme court found misleading in *State v. Grannis*, 183 Ariz. 52, 60-61, 900 P.2d 1, 9-10 (1995). But the clause the court found problematic in *Grannis* was specifically corrected by the instruction here. The problematic clause in *Grannis* stated, "A defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force." *Id.* at 61, 900 P.2d at 10. The court found it was error to have given the instruction because the last clause could have led the jury to wrongly "believe that actual deadly force rather than reasonably apparent deadly force was necessary to justify deadly force in response." *Id.*

¶28 By contrast, the clause in the instruction Holden requested at trial stated that "a defendant may use deadly physical force in self-defense only to protect against *what a reasonable person in his situation would believe* is another's use or threatened use of deadly physical force." (Emphasis added.) Holden nonetheless argues the language after that phrase is confusing because it only describes the use of *physical* force in regard to apparent danger. Therefore, he concludes, "the instruction could have misled the jury to believe that non-deadly physical force could be used in response to an apparent danger, but

deadly force could only be used in response to actual danger." But, the concept of apparent danger is appropriately inserted in the context of deadly force by the phrase, "what a reasonable person in his situation would believe is another's use or threatened use of deadly force." The instruction was not confusing in describing the circumstances under which deadly force may be used, and therefore Holden has not raised a colorable claim his counsel's performance was deficient on that ground.

¶29 Next, Holden asserts appellate counsel was ineffective in failing to challenge the trial court's denial of his request for a *Willits* instruction. *See State v. Willits*, 96 Ariz. 184, 187, 191, 393 P.2d 274, 276, 279 (1964) (endorsing instruction allowing jury to infer that evidence lost or destroyed by state would have favored the defense). Specifically, Holden contends the trial court should have instructed the jury that it could infer, from the state's failure to take measurements at the crime scene and to preserve the location of the cow's head, that those measurements and location would have supported the defense's case. A defendant is entitled to a *Willits* instruction if prejudice results from the state's failure to preserve potentially exculpatory material evidence. *State v. Lang*, 176 Ariz. 475, 484, 862 P.2d 235, 244 (App. 1993).

¶30 However, as noted, Holden can prevail on his claim of ineffective assistance of appellate counsel only if he can demonstrate that there is a reasonable probability the result of the appeal would have been different had the issue been raised at that time. *See Strickland*, 466 U.S. at 694. Thus, we must assess not only whether the trial court's failure

to provide a *Willits* instruction was error, but also whether any such error, if properly raised on appeal, would have entitled Holden to a new trial.

¶31 Although Holden has articulated, albeit summarily, why the placement of objects and bloodstains in the room and the distance between them was "of critical importance to the defense," Holden has not squarely addressed whether a *Willits* instruction on this point could have changed the ultimate outcome of the case. In light of the undisputed evidence that Holden shot Danny T. at close range after repeatedly threatening that he would do so, the eyewitness testimony contradicting Holden's contention that the shooting occurred either by accident or in self-defense, and Holden's ability to argue the potentially exculpatory nature of the lost evidence even in the absence of an instruction, Holden has not persuaded us that appellate counsel's failure to raise the issue on appeal affected the outcome of his case.

¶32 Holden also argues that trial counsel was "ineffective" in failing to seek a *Willits* instruction arising from the failure of the deputies to take photographs of the scene before it was disturbed. Because Holden utterly fails to articulate why that failure constituted prejudicially deficient performance of counsel, we decline to address that claim on its merits. *See State v. Blodgette*, 121 Ariz. 392, 395, 590 P.2d 931, 934 (1979).

Redaction of Statement

¶33 Holden argues his trial counsel was ineffective for failing to request a redaction of "certain irrelevant and unfairly prejudicial parts" of his post-arrest statement to police.

The trial court granted his motion in limine to preclude evidence about his conduct before he had arrived at Jim's house but allowed the state "to introduce evidence as to Mr. Holden's behavior, attitude and conduct while in [Jim's] residence on the day in question." In addition, the court granted his motion to extensively redact his statement to police in other respects.

¶34 In his Rule 32 petition, Holden complained about several references that remained in his post-arrest statement. In those portions of his statement, Holden appears to confirm that he physically assaulted a man named Walter before going to Jim's house. He also states that he told Orrin, one of the people at Jim's house when the shooting occurred, to wait in the back bedroom when he went to help Jim with Danny. In another segment, Holden fails to respond to police allegations that he "bitch slap[ped]" everyone he had encountered before he arrived at Jim's house. Finally, he complains that his counsel failed to object, or move for a mistrial, when one of the state's witnesses testified Holden had told her to watch over Orrin. He contends the admission of this evidence created a reasonable probability the jury's verdict was influenced by unfair prejudice.

¶35 The admission of the two pieces of evidence addressing how Holden behaved toward Orrin at Jim's house was in conformity with the court's ruling on the motion in limine and, therefore, it was not ineffective for trial counsel not to object or move for a mistrial in response. *See State v. Jonas*, 162 Ariz. 32, 34, 780 P.2d 1080, 1082 (App. 1988) ("We conclude that defense counsel cannot be faulted for failing to object to testimony

which was admissible."). Nor did the trial court err when it admitted the evidence because it was relevant on the issue of Holden's intent.

¶36 It appears the jury was permitted to hear about Holden's admission to assaulting a person before arriving at Jim's house and the officer's allegation that he had "bitch slap[ped]" everyone he had encountered during that time, in violation of the court's ruling. But we cannot conclude that trial counsel's failure to prevent those violations, standing alone, constituted ineffective assistance of counsel. Counsel does not fall below an objective standard of representation by failing to object to every single piece of potentially inadmissible evidence against his or her client. *See State v. Valdez*, 167 Ariz. 328, 332, 806 P.2d 1376, 1380 (1991) (defense counsel's failure to object to prosecutor's comment about plea bargain at trial was a "single mistake" that did not render his overall performance below objective standards of representation); *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) ("Defendants are not guaranteed perfect counsel, only competent counsel."). And, in response to the admission of some of the potentially prejudicial pieces of information, counsel asked the court to instruct the jury that it must not consider evidence of Holden's other acts in deciding his guilt or innocence and the court granted his request. We presume jurors follow the court's instructions. *State v. Tucker*, 215 Ariz. 298, ¶ 89, 160 P.3d 177, 198 (2007). The trial court did not abuse its discretion in its implicit determination that Holden had not raised a colorable claim of prejudicially deficient performance of counsel.

Right to Testify

¶37 Holden next argues his trial counsel was ineffective for pressuring him not to testify and for not making clear it was his decision. Although "disagreements in trial strategy will not support a claim of ineffective assistance of counsel, . . . certain basic decisions transcend the label 'trial strategy' and are exclusively the province of the accused: namely, the ultimate decisions on whether to plead guilty, whether to waive a jury trial, and whether to testify." *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987), *quoting State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984) ("Counsel is encouraged to provide guidance and to urge the client to follow professional advice, but the final decision as to these three crucial questions rests with the client.").

¶38 Holden stated in an affidavit submitted with his petition for post-conviction relief that he never wavered in his desire to testify at trial, that his "counsel's repeated disregard for [his] earlier answers coerced [him] to believe [he] didn't have a choice to testify," and that "counsel never made it clear to [him] that [he] could override their decision." Holden's allegations, if true, amount to more than mere regrets about his decision not to testify. *See State v. Schurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993) (regretting decision not to testify insufficient to raise colorable claim of ineffective assistance but distinguishing mere regrets from defendant's lack of awareness of right to testify or counsel's affirmative deprivation of that right).

¶39 Whether a petitioner has asserted a colorable claim is "to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). But when there is doubt, the trial court should hold an evidentiary hearing "'to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.'" *Id.* at 73-74, 750 P.2d at 16-17 (vacating dismissal of petition and remanding for evidentiary hearing when petition specifically described instances of counsel's ineffectiveness and was partially corroborated by affidavit of counsel's secretary), *quoting State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). If we accept the avowals in Holden's affidavit as true, the violation of his right to testify would be reversible error and entitle him to a new trial. *See State v. Gulbrandson*, 184 Ariz. 46, 64-65, 906 P.2d 579, 597-98 (1995) (violation of fundamental constitutional right to testify would result in new trial); *State v. Martin*, 102 Ariz. 142, 147, 426 P.2d 639, 644 (1967) (failure to permit defendant to take stand reversible error). For this reason, he has stated a colorable claim for which he is entitled to an evidentiary hearing. *See State v. Lemieux*, 137 Ariz. 143, 147, 669 P.2d 121, 125 (1983) (petitioner entitled to evidentiary hearing if, when allegations are taken as true, they would affect outcome of case); *see also Bennett*, 213 Ariz. 562, ¶ 30, 146 P.3d at 69 (defendant entitled to hearing on merits if she states colorable claim); *State v. Shedd*, 146 Ariz. 5, 7, 703 P.2d 552, 554 (App. 1985) (holding evidentiary hearing on claim defendant was denied right to testify by attorney but ultimately denying relief).

Danny's Reputation for Violence

¶40 Holden argues his trial counsel was ineffective for failing to call anyone to testify about Danny's violent reputation. "An accused may offer proof of the victim's reputation for violence when a claim of self-defense is raised." *State v. Santanna*, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987). Although Holden presented affidavits demonstrating that such evidence was readily available and arguably relevant, he has not demonstrated that the failure to present such evidence was sufficiently prejudicial to constitute ineffective assistance of counsel.

¶41 The jury heard undisputed evidence that Danny was intoxicated, had behaved rudely, had ignored the owner's requests that he leave, and had picked up items in a manner arguably threatening to Holden. Accordingly, the jury received ample evidence that Danny was a potentially dangerous person given his state at the time of the shooting. Furthermore, in light of the testimony of three eyewitnesses that Danny was not engaged in any aggressive behavior at the time Holden shot him, we cannot conclude that trial counsel's failure to present evidence of Danny's reputation for violence affected the outcome of the case. Thus, the trial court did not abuse its discretion in rejecting Holden's ineffective assistance claim urged on this ground.

¶42 Holden also contends trial counsel was ineffective for failing to introduce specific acts of violence by Danny. But it is undisputed Holden did not know about those other acts at the time he shot Danny. Therefore, evidence of them was not relevant. *See*

State v. Taylor, 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991) ("Arizona courts have long held that a murder defendant who defends on the basis of justification should be permitted to introduce evidence of specific acts of violence by the deceased *if the defendant either observed the acts himself or was informed of the acts before the homicide*.") (emphasis added). Despite this longstanding rule, which applies Rule 404(a)(2), Ariz. R. Evid. (specifically addressing evidence brought to show character trait of a victim), Holden attempts to argue the evidence should have been admitted anyway under Rule 404(b), Ariz. R. Evid. But he does not articulate why that rule would be applicable here in light of the more specifically applicable provisions of Rule 404(a)(2). Nor does he cite any authority applying Rule 404(b) under such circumstances.

Unanimous Rejection of Self-Defense

¶43 Holden contends that fundamental, nonwaivable error occurred at trial because the trial court did not submit an interrogatory to the jury that would have permitted it to show whether its rejection of his self-defense theory had been unanimous. But this issue could have been raised in his direct appeal and he is, therefore, precluded from raising it as a ground for post-conviction relief. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶44 In the alternative, Holden contends without explanation that "trial and appellate counsel were ineffective" with respect to this claim. But the trial court did not err in dismissing this claim because Holden cannot prove he suffered prejudice as a result of any alleged deficiency of counsel in failing to seek an interrogatory. He relies on *United States*

v. Southwell, 432 F.3d 1050 (9th Cir. 2007), in which the court held the defense of insanity must be unanimously rejected by the jury in order to have a unanimous verdict on the underlying offense. *Id.* at 1056. But the court in that case was addressing a claim of error based on the court's refusal to answer the jurors' question about what to do if they did not agree on insanity. *Id.* at 1053.

¶45 Here there was no such evidence of juror confusion. The jury was instructed that it must agree on "whether or not the evidence does show beyond a reasonable doubt" the defendant committed the offense. And the court instructed the jury that if it found "the defendant has proven by a preponderance of the evidence that [Holden] acted in self-defense then [it] must find the defendant not guilty of the offense—of any offense." It also instructed the jury that "All 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is 'guilty' or 'not guilty.'" Had any individual juror believed by a preponderance of the evidence that Holden had shot Danny in self-defense, these instructions would have prevented that juror from joining in the ultimate verdict of guilt. When the foreperson read the verdict, the jurors were individually polled and each stated it was his or her verdict. We find no abuse of discretion in the dismissal of this claim.

Unredacted Tape

¶46 We find no merit to Holden's claim that he is entitled to a new trial because the audiotape submitted to the jury contained material the trial court had ordered redacted. Despite his assertions below to the contrary, he is precluded from raising the claim because

he failed to raise it on appeal. *See* Ariz. R. Crim. P. 32.2(a). And, even if he were not precluded from raising it, we reject Holden's perfunctory, "alternative" assertion that appellate counsel was ineffective in failing to raise the issue on appeal. Holden cannot show he was prejudiced by the state's failure to redact the final portion of the tape because he has not shown any of the twelve jurors listened to the tape during their deliberations.[8] *See State v. Ketchum*, 191 Ariz. 415, 416, 956 P.2d 1237, 1238 (App. 1997). The court did not abuse its discretion in dismissing this claim.

Voir Dire

¶47 Holden's claim that he is entitled to a new trial based on a juror's lack of response to a voir dire question is also precluded because he did not raise it on appeal. *See* Ariz. R. Crim. P. 32.2(a). We do not address Holden's perfunctory statement that, alternatively, his claim is one of newly discovered evidence under Rule 32.1(e) because he made no attempt to analyze the claim under that subsection of the rule. *See* Ariz. R. Crim. P. 32.5 (post-conviction petition must contain memoranda of points and authorities).

Presentence Incarceration Credit

¶48 We agree with Holden that the trial court improperly calculated his presentence incarceration credit. It is undisputed that Holden was arrested on August 5,

[8]Holden submitted the affidavit of one of the jurors who said only that she could not remember whether the jury had listened to the tape but "may have done so." In addition, he submitted two affidavits by an investigator who said two other jurors had told him they could not remember having listened to the tape and he could not find two of the jurors.

2002, and that he remained in custody until he was sentenced on September 22, 2003. The number of days between those dates is 413 days, as Holden asserts, not the 403 days reflected in the court's sentencing minute entry. Accordingly, we modify Holden's sentence to include 413 days of presentence incarceration credit.

Cumulative Effect of Errors

¶49 Finally, Holden contends he is entitled to a new trial because of the cumulative effect of "errors and omissions by the State, the court, and defense counsel." But assuming *arguendo* we could consider the cumulative effect of the varying types of purported errors as Holden urges, *see State v. White*, 168 Ariz. 500, 508, 815 P.2d 869, 877 (1991) (rejecting cumulative error doctrine in context of a variety of claimed errors), we have not herein found the trial court committed any trial errors. Nor has Holden presented us with any concrete instances of ineffective assistance of counsel that we could consider cumulatively.[9]

[9]Arizona courts have acknowledged that they must evaluate prosecutorial misconduct claims cumulatively. *See State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998); *see also State v. Ellison*, 213 Ariz. 116, n.11, 140 P.3d 899, 916 n.11 (2006). Controlling jurisprudence likewise requires that we consider any claims of ineffective assistance of counsel, raised under the Sixth Amendment to the United States Constitution, cumulatively. *See Strickland v. Washington*, 466 U.S. 668, 694, 105 S. Ct. 2052, 2068 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different.") (emphasis added); *see also Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (in ineffective assistance of counsel context, "'prejudice may result from the cumulative impact of multiple deficiencies'"), *quoting Copper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978).

¶50 For the foregoing reasons, we grant the petition for review, deny relief in part, and remand for an evidentiary hearing to determine whether Holden has established his counsel was ineffective for depriving him of his right to testify.

_____
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Judge

_____
GARYE L. VÁSQUEZ, Judge